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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LOUISVILLE EDIBLE OIL PRODUCTS, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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July 12, 1991

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QUESTION PRESENTED

Whether imposition of a significant penalty by a local government entity, acting pursuant to delegated federal authority and pursuant to federal standards, bars a subsequent federal prosecution for the same conduct under the Double Jeopardy Clause of the Fifth Amendment.

LIST OF PARTIES

In addition to the petitioner listed in the caption, the following are additional petitioners:

Presidential, Inc.

A. Dean Huff

Raymond Carl Marrillia

STATEMENT PURSUANT TO RULE 29.1

Pursuant to Rule 29.1 of the Rules of this Court, the following list identifies all of petitioners' affiliated companies and subsidiaries:

1. Louisville Vegetable Oil Supply Co., Inc.
2. Golden Foods/Golden Brands, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Louisville Edible Oil Products, Inc., Presidential, Inc., A. Dean Huff, and Raymond Carl Marrillia, Jr., ("petitioners") hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 926 F.2d 584 (6th Cir. 1991). The district court's memorandum opinion and order, denying petitioners' motion to dismiss the indictment, (App., *infra*, 10a-20a) is not reported.

JURISDICTION

The opinion of the court of appeals was entered on March 1, 1991. Rehearing was denied on April 15, 1991. App., *infra*, 21a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .

U.S. Const. amend. V.

STATEMENT

1. *The Clean Air Act*: The Clean Air Act (the "Act") is a complex interweaving of over ten different pieces of federal legislation, enacted between 1955 and 1990, reflecting the legislative trial and error of efforts to regulate and control air pollution. The Act as it exists today mandates federal leadership, but envisions significant local participation in connection with enforcement of air pollution regulations. See 42 U.S.C. § 7401 (1988).[1]

One of the primary purposes of the Act is to establish standards for air quality. To accomplish this goal the Act sets up primary and secondary national Ambient Air Quality Standards ("AAQS"). 42 U.S.C. § 7409. These standards generally are to be achieved in accordance with State Implementation Plans ("SIPs") consistent with the federal ambient standards. *Id.* § 7410. The SIPs also provide for the regulation of areas unable to attain AAQS and are designed to prevent the signifi-

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[1] The Clean Air Amendments of 1990, codified as amended at 42 U.S.C. §§ 7401-7671q. (Supp. 1991) and effective only as of November 15, 1990, do not apply to the charges involved in this appeal. See The Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 711(b), 104 Stat. 2684.

cant deterioration of areas already in compliance with the federal standards. *Id.* §§ 7470-79, 7501-08.

In addition to these general requirements, the Act establishes National Emission Standards for Hazardous Air Pollutants ("NESHAP"). These standards mandate limits on the emission of certain defined substances. 42 U.S.C. § 7412. Other substances, for which it is not feasible to prescribe safe emission standards, are governed by regulations establishing the equipment, operations, and work practices to be used in dealing with those substances. *Id.* § 7412(e)(1). For example, asbestos, a natural mineral fiber once widely used in commercial insulation, has been classified as a hazardous air pollutant by the Environmental Protection Agency ("EPA"), and work practice regulations have been enacted to control the manner in which asbestos is removed from buildings during modification or demolition. 40 C.F.R. §§ 61.140-.156 (1990).

Enforcement of the various requirements in the Act is accomplished by "an active and complex partnership between the federal government and the states." D. Selmi & K. Manaster, *State Environmental Law* § 6.02, at 6-4 (1990). The EPA is authorized to file notices of violations of state plans and to issue compliance orders. 42 U.S.C. § 7413(a). The EPA also is authorized to commence civil actions against those who fail to respond to compliance orders or who otherwise violate emission standards. *Id.* § 7413(b). In addition, the Act provides for criminal actions to be brought against a person who knowingly violates emission standards. *Id.* § 7413(c). Moreover, the EPA can assess "noncompliance penalties" which require persons in violation of the Act to forfeit any economic benefit they have enjoyed by reason of their noncompliance. *Id.* § 7420.

In general, the Act delegates to the individual states the immediate responsibility for maintaining air quality

standards within their borders. In order to participate in the enforcement of the Act, however, a state must submit a proposed State Implementation Plan to the EPA explaining how it will meet the Ambient Air Quality Standards. If the state plan receives the EPA's approval, the state is authorized to enforce directly the federal air quality standards. 42 U.S.C. § 7410(a)(1). State law that sets emission standards at levels less stringent than federal standards is preempted. 42 U.S.C. § 7416; H.R. Rep. No. 728, 90th Cong., 1st Sess. 1, *reprinted in* 1967 U.S. Code Cong. & Admin. News 1938, 1939.

With respect to hazardous air pollutants, the states also must develop procedures for implementing the federal hazardous air pollutant standards and submit them to the EPA for approval. If the EPA determines that the state procedures are adequate, the Administrator of the EPA will "delegate to such State any authority he has under this chapter to implement and enforce such standards." 42 U.S.C. § 7412(d)(1).

Notwithstanding this delegation of authority, the Act reserves to the federal government the authority to enforce emission standards directly, even when a state plan is in place. *Id.* § 7412(d)(2). Congress concluded that the reservation of such concurrent jurisdiction to enforce pollutant standards was necessary in the event states with delegated authority failed to enforce them. H.R. Rep. No. 1146, 91st Cong., 2d Sess. 24, *reprinted in* 1070 U.S. Code Cong. & Admin. News 5356, 5380. Thus, "[u]nder current law, the formal State role" with respect to hazardous air pollutants "is limited to the enforcement of the handful of emission standards which the Agency has promulgated for hazardous air pollutants." S. Rep. No. 228, 101st Cong., 2d Sess. 192, *reprinted in* 1990 U.S. Code Cong. & Admin. News 3385, 3577.

2. *Proceedings by the Jefferson County Air Pollution Control District*: Consistent with the scheme established under the Act, the Commonwealth of Kentucky submitted procedures for implementing and enforcing the federal standards for hazardous air pollutants to the EPA. The EPA, in turn, approved Kentucky's request for "the delegation of Federal authority" for enforcement of these standards after determining that the procedures adopted by Kentucky were adequate. *Delegation Notice*, 42 Fed. Reg. 64,735 (1977). As part of this delegation of federal law, Kentucky then adopted the national asbestos regulations, 40 C.F.R. 61, Subpart M, in their entirety. 401 K.A.R. 57:011 § 2, C.A. App. 204.[2]

The state government, acting through the Kentucky Natural Resources and Environmental Protection Cabinet, has executed a Memorandum of Agreement with the Air Pollution Control District of Jefferson County Board (the "Board") for the regional enforcement of the federal standards. See *Memorandum of Agreement*.[3] The Board, in turn, adopted Air Pollution Control Regulation ("A.P.C.") 5.04, which also adopts verbatim the language of the federal asbestos standard, 40 C.F.R. 61, Subpart M. Thus, while the asbestos regulations enforced by the Board and the EPA differ in title, the content of the Board regulations constitute a reenactment of the federal regulations governing asbestos emissions.

The penalties at issue in this case derive from the alleged conduct of petitioners from 1986 to 1988, when petitioners were in the process of relocating their facilities from South Shelby Street to 7th Street in Louisville, which is located in Jefferson County, Kentucky. Petitioner Louisville Edible Oil Products is a Kentucky corporation in the business of producing edible oils such

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[2] All materials that were submitted in a joint appendix to the United States Court of Appeals for the Sixth Circuit are cited herein as "C.A. App."

[3] The Agreement is reproduced in Appendix B of the Brief for the United States for the court of appeals.

as salad oil. Presidential, Inc., is an Indiana corporation affiliated with Louisville Edible operating as its construction and demolition contractor. A. Dean Huff is the Director and President of Presidential and a Special Products Manager of Louisville Edible. Raymond Carl Marrillia, Jr. is a Director and the Secretary-Treasurer of Presidential and the Vice President of Facilities Management of Louisville Edible.

Both buildings involved in the case were old and contained equipment insulated with asbestos which was transferred between the buildings over the course of several years. In their conduct of the relocation, petitioners contracted with various certified asbestos abaters in an attempt to ensure the safe removal of those materials. Nevertheless, petitioners were cited by the Board as responsible for violations of the Board's asbestos regulations.

The Board cited petitioners in October 1986 for purported asbestos violations involving two insulated tanks found in the rear of the 7th Street property. As a result of this notice of violation, petitioners subsequently paid the Board a fine of $25,000 and entered into an Agreed Order of Satisfaction acknowledging that at that time they were in compliance with the asbestos regulations. C.A. App. 138. In April 1988, petitioners again were cited by the Board for asbestos-related violations. Those violations resulted in the payment of a fine of $24,000. The Order specifically stated that petitioners did not admit to any violations of the regulations nor was the agreement to be construed as an admission of guilt. C.A. App. 146.

In August 1988, the Board issued a notice of violation against petitioners for the allegedly improper handling of pipes insulated with asbestos. In the course of negotiating an appropriate penalty for this third violation, the Board consulted several times with the EPA's Region IV office, which recommended assessing a large fine in order to deter recidivism, and with an Assistant United States

Attorney representing the EPA's Office of Criminal Investigations, which at the time was contemplating bringing a criminal action against petitioners. After "[c]onsidering all factors involved," the Board agreed to assess a penalty of $125,000. *Offutt Memo*, C.A. App. 124, 126. The EPA, which was informed of the extent of the penalty, did not exercise its own authority revoke Kentucky's delegation and pursue its own civil or criminal action against petitioners, which it could have done if it had concluded that federal action was necessary to protect fully the Clean Air Act interests implicated by the Board's enforcement action. *Delegation Notice*, 42 Fed. Reg. 64,736 B(10) (1977). Indeed, in its final order the Board acknowledged that the EPA had indicated that "this agreement [would] be an acceptable settlement for the alleged violations." *Board Order* #6-89, C.A. App. 156.

3. *Proceedings Below*: Despite the payment of fines totaling $174,000 as a penalty for their violations of the asbestos regulations, petitioners were indicted by a federal grand jury in Louisville, Kentucky, on April 19, 1990. Count One of the superseding indictment (dated May 7, 1990) charged that in September and October of 1986, petitioners knowingly had violated asbestos work practices and knowingly emitted asbestos into the air from their 7th Street facility in violation of the Clean Air Act, 42 U.S.C. §§ 7412-13, and the federal asbestos standards, 40 C.F.R. §§ 61.145-.147, 61.152 (1990). Petitioners already had been fined $25,000 by the Board for the same asbestos violations at the 7th Street property. *Agreed Order of Satisfaction*, C.A. App. 138. Count 5 charged that petitioners, in April 1988, violated the Clean Air Act and asbestos emission standards at their Shelby Street facility. Again, the Board already had fined petitioners $24,000 for those alleged asbestos violations. *Board Order* #007-88, C.A. App. 145.

Count 3 of the federal indictment charged that petitioners, in August 1988, had violated the asbestos regulations at the 7th Street site. Count 6 charged that petitioners, in September 1988, violated the asbestos regula-

tions at the Shelby Street site. Petitioners had been fined $125,000 by the Board for the same conduct charged in Counts 3 and 6. *Board Order* 6-89, C.A. App. 156. The specific asbestos provisions that the federal indictment alleges were violated are identical to the Board regulations, which provided the basis for the fines paid by petitioners pursuant to the Board's delegated federal authority. *Compare* 40 C.F.R. §§ 61.145-.147, 61.152 *with* A.P.C. Regulation 5.04 §§ 6-8, 13.

In the United States District Court for the Western District of Kentucky, petitioners filed a motion to dismiss Counts 1, 3, 5 and 6 as barred by the Double Jeopardy Clause of the Fifth Amendment. Petitioners argued that they already had paid fines to the Board for the same regulations as charged in the indictment. Moreover, petitioners asserted that the fines constituted "punishment" for purposes of the Double Jeopardy Clause. See *United States* v. *Halper*, 490 U.S. 435 (1989). Thus, petitioners argued that the federal criminal charges constituted successive prosecutions for the same acts in violation of the Double Jeopardy Clause. *Id.* The district court denied the motion to dismiss on the ground that the Board and the EPA were separate "sovereigns" and therefore could impose multiple penalties for the same conduct. App., *infra*, 16a.[4]

The court of appeals affirmed. App., *infra*, 9a. Even assuming that the fines were punitive, the court of appeals agreed with the district court's conclusion that the Board and the United States were "dual sovereigns" and thus entitled separately to pursue the imposition of penalties against petitioners. App., *infra*, 7a. The court rejected petitioners' argument that this case fell within the "*Bartkus* exception" to the "dual sovereignty" doctrine. See *Bartkus* v. *Illinois*, 359 U.S. 121, 123-24 (1959) (dual

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[4] Because it resolved the double jeopardy claim by reference to the "dual sovereignty" doctrine, the district court did not resolve the issue whether the fines assessed by the Board were "punitive" for purposes of the Double Jeopardy Clause. App., *infra*, 15a.

sovereignty doctrine inapplicable where one sovereign is acting on behalf of another). The court held that the Board was not acting on behalf of the EPA, but rather in "inter-sovereign" cooperation with it. App., *infra*, 8a. Accordingly, the court of appeals concluded that the federal government could bring its own criminal prosecution against petitioners based on a violation of the same law and in connection with the same conduct that formed the basis of the fines paid to the Board.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit has decided an issue of substantial importance to federal enforcement of the Clean Air Act in a way that is inconsistent with this Court's prior decisions and with basic principles underlying the Double Jeopardy Clause. Moreover, the question presented has important ramifications for Congress's delegation of federal law enforcement authority to the states and for the ability of states and regulated industries to settle environmental disputes without litigation. The decision of the court below is manifestly unfair to criminal defendants who will be twice punished for the same acts pursuant to the federal enforcement provisions of the Clean Air Act and therefore requires review now.

The decision of the court of appeals focused solely on the identity of the sovereigns enforcing the Clean Air Act (*i.e.*, state and federal entities) without considering that federal law provided the *sole* source of authority for both penalty proceedings. Because the "state" penalty was imposed under the specific federal authority delegated pursuant to an Act of Congress and not pursuant to any inherent source of state power, there is no basis for allowing petitioners to be subjected to multiple prosecutions and potentially multiple punishments. This delegation of enforcement authority—which is inherent in the structure of the Clean Air Act—presents a serious and fundamental issue under the Double Jeopardy Clause that warrants review by this Court.

1. The Double Jeopardy Clause represents a "fundamental ideal in our constitutional heritage." *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969). The principle that a person should not be placed in jeopardy more than once for the same offense has it roots in ancient Greek and Roman law, and the passage of the Fifth Amendment secured that principle a place in our system of constitutional governance. See generally *United States* v. *Wilson*, 420 U.S. 332, 339-40 (1975). The Double Jeopardy Clause curbs the formidable weapon for oppression that would exist if a government had the power to threaten to add to the punishment already given to a defendant for a single violation of law. See *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). Thus, the Double Jeopardy Clause prohibits not only the imposition of a second punishment but the *risk* of receiving multiple punishments. See *Price* v. *Georgia*, 398 U.S. 323, 326 (1970).

Because the Double Jeopardy Clause serves such a central role in the protection of individuals from the potentially oppressive power of government, this Court has refused to construe the Double Jeopardy Clause narrowly or to enforce it by means of rigid, mechanical rules. See *Serfass* v. *United States*, 420 U.S. 377, 390 (1975). Thus, while the language of the Amendment refers only to "life or limb," the Clause long has been understood to prohibit a broader range of dual punishments. See *Breed* v. *Jones*, 421 U.S. 519, 528 (1975). For purposes of the Double Jeopardy Clause, punitive fines are treated in the same way as capital punishment or sentences of imprisonment. See *Jeffers* v. *United States*, 432 U.S. 137, 155 (1977).

Under the dual sovereignty doctrine, however, the Double Jeopardy Clause does not generally apply to multiple prosecutions by separate sovereign governments on the theory that a single act can be viewed as a transgression against the authority of more than one sovereign. Although both sovereigns may punish the offender for

the same act, the Double Jeopardy Clause is not invoked because the offender has committed two different offenses—one against each sovereign—and is not subject to punishment twice for the same *offense*. "[I]t cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985) (quoting *Moore* v. *Illinois*, 14 How. 13, 20 (1852)).

The dual sovereignty doctrine stems from a recognition that federal and state governments must have authority to punish violations of their own organic law and thereby to protect their own distinct interests. "Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." *Heath*, 474 U.S. at 89 (quoting *United States* v. *Lanza*, 260 U.S. 377, 382 (1922)). Therefore, a federal prosecution generally will not bar a state prosecution for the same act, nor will a state prosecution generally bar later prosecution by the federal government. *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), *Abbate* v. *United States*, 359 U.S. 187 (1959).

This Court in *Bartkus*, 359 U.S. 121, however, recognized that the dual sovereignty doctrine was not without limits. In *Bartkus*, the Court upheld a subsequent state prosecution for a crime for which the defendant had already been acquitted in federal court, but the Court stated that the Double Jeopardy bar *would* apply in the context of dual sovereigns in circumstances where one sovereign merely was acting on behalf of the other as its agent. *Id.* at 123-24. Thus, if a state undertook to prosecute a defendant on behalf of the federal government, it would be "in essential fact another federal prosecution" and double jeopardy would prevent the subsquent prosecution. *Id.* at 124.

2. Because the court of appeals applied the dual sovereignty doctrine in circumstances in which the state and federal penalties are based on the *same* authority, the decision below is wholly inconsistent with basic principles underlying the dual sovereignty doctrine of the Double Jeopardy Clause as articulated by this Court in *Bartkus*, 359 U.S. at 121. The fines petitioners paid to the Board were based on alleged violations of federal standards adopted by the Board, pursuant to authority delegated by an Act of Congress. See *supra* p. 5. In fact, Kentucky, and the Board as the subdelegatee of the State, were prohibited by the Clean Air Act from seeking to enforce any standards which did not meet minimum federal requirements. 42 U.S.C. § 7416. Furthermore, the federal authorities were empowered to derail the Board's penalty proceedings at any time by revoking Kentucky's delegation. *Delegation Notice*, 42 Fed. Reg. 64,736 B(10) (1977).

Thus, the Board in this case, while ostensibly operating to enforce its own laws, was in reality operating as an agent of Congress and enforcing national emission standards on behalf of the EPA. The Board's authority in these circumstances was fundamentally inconsistent with the basic principles of independent "sovereignty" underlying the dual sovereignty doctrine. Allowing the federal government to thwart the prohibitions of the Double Jeopardy Clause by imposing a second punishment on petitioners would directly conflict with the limitations inherent in the dual sovereignty exception to the Double Jeopardy Clause. See *supra* p. 10.

In this case, the Board and the federal government clearly were not protecting their own distinct sovereign interests. Unlike cases where the same "conduct" implicated diverse federal and state statutory prohibitions, see *United States* v. *Patterson*, 809 F.2d 244 (5th Cir. 1987) (state prosecution for murder and federal prosecution for civil rights violations), the same statute—the Clean Air Act—created the enforcement authority relied

on by both the Board and the federal government. See *supra* pp. 3-4, 6. Thus, this is unlike those cases where the *Bartkus* exception to the dual sovereignty doctrine has been held to be inapplicable. The Board did not merely inform the EPA of its negotiations and "cooperate" with the federal government in the investigation or preparation of its case. See *United States* v. *Jordan*, 870 F.2d 1310 (7th Cir.), *cert. denied*, 110 S. Ct. 101 (1989) (state informed Bureau of Alcohol, Tobacco and Firearms of possible weapons charge); *United States* v. *Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984) (state/federal joint investigation), *United States* v. *Russotti*, 717 F.2d 27 (2d Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984) (federal government withdrew from murder investigation and later filed RICO charges); *United States* v. *Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (FBI agent testified at state trial). Instead, the very authority invoked by the Board in penalizing petitioners was drawn directly from the federal government. See *supra* pp. 5-8.

This Court in *Bartkus* stated that "if the state courts had become empowered to try the defendant for the federal offense, then such a state trial would bar a federal prosecution." *Bartkus*, 359 U.S. at 130. In this case, the penalties imposed by the state were based on federal law standards, incorporated into state law by means of congressional and EPA delegation of circumscribed enforcement authority. Accordingly, the federal indictment is based on the "very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question." *Id.* If the explicit delegation of federal authority at issue in this case does not meet the *Bartkus* exception to the dual sovereignty doctrine, then *Bartkus* is meaningless.

3. The rule of law announced by the court below, which authorizes multiple state and federal punishments for violation of identical Clean Air Act standards, will

substantially undermine the efforts of local governments attempting to enforce air quality control standards under the Clean Air Act. If the fines imposed by the Board, pursuant to statutory notices of violation, do not bar subsequent federal criminal enforcement, alleged violators will have little or no incentive to settle with the local authority.[5] Rather than resolving violations through negotiated settlement, parties who risk duplicative federal enforcement will vigorously resist liability. Such a development is contrary to overall enforcement efforts. See *Marek* v. *Chesny*, 473 U.S. 1, 10 (1985) ("clear policy of favoring settlement of all lawsuits"). Moreover, such a rule is totally at odds with the purpose of delegating enforcement to local authorities. The advantages of such delegation, including swift and certain resolution of violations, will be impaired significantly if all private entities must insist upon formal federal approval or resolution of state-initiated claims.

The proper application of the *Bartkus* exception by the court below also would have done nothing to undermine the basic interests endorsed by Congress in delegating Clean Air Act enforcement authority to the states. If the EPA had been dissatisfied with the state's handling of the federal air quality standards it simply could have revoked the state's delegated authority "in whole or in part." *Delegation Notice*, 42 Fed. Reg. 64,736 B(10) (1977). In fact, this right of revocation was a specific condition on which the delegation of authority to Kentucky was based. *Id.* at B. Congress implemented the

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[5] The notices of violation by the Board in this case, as in many instances, were resolved by settlement between the Board and petitioners. See *supra* pp. 6-7. For a discussion of the value of settlement in environmental cases in general, see D. Selmi & K. Manaster, *supra* p. 3, § 7.03 [1] ("increased use of negotiated rulemaking, mediation, and other alternative dispute resolution techniques for the settling of environmental controversies is a further indication of this [negotiated problem-solving] orientation").

concurrent enforcement provision in order to reserve the federal government's right to prosecute offenders itself in the event state authorities failed to enforce the federal standards as vigorously as the federal authorities preferred. See H.R. Rep. No. 1146, 91st Cong., 2d Sess. 23, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5356, 5379-80; *Delegation Notice*, 42 Fed. Reg. 64,735-36 at B(5) (1977); *cf.* 42 U.S.C. § 7420(b)(2) (EPA authorized to collect noncompliance penalty only if state has not received delegation of authority or if state fails to collect penalty itself). However, there is no suggestion that Congress ever contemplated that federal authorities would use their concurrent authority in order to enforce the Act after the state already had done so.

4. Not only is the decision below inconsistent with the *Bartkus* exception, it also is inconsistent with the related Double Jeopardy principles articulated by this Court in *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978). In *Wheeler*, the United States indicted a Native American for statutory rape after a Navajo tribal court already had convicted him of contributing to the delinquency of a minor in connection with the same incident. The defendant argued that because the Navajo Tribe was an arm of the federal government and the offense for which he had been convicted was a lesser included offense of statutory rape, the Double Jeopardy Clause barred the subsequent federal prosecution. *Id.* at 316.

In determining whether to apply the dual sovereignty doctrine to bar the double jeopardy claim, this Court in *Wheeler* noted that "the 'dual sovereignty' concept does not apply . . . in every instance where successive cases are brought by nominally different prosecuting entities." *Id.* at 318. The Court noted, for example, that dual sovereignty did not apply and the Double Jeopardy Clause therefore precluded a territorial court in the Philippines from retrying a soldier for an offense after acquittal by a federal court-martial. *Id.* (citing *Grafton* v. *United*

States, 206 U.S. 333 (1907)). Such successive prosecutions were held to be impermissible because both courts were "creations emanating from the same sovereignty." *Id.* (quoting *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 264-66 (1937)). Similarly, *Waller* v. *Florida*, 397 U.S. 387 (1970) held that "a city and the State of which it is a political subdivision could not bring successive prosecutions for unlawful conduct growing out of the same episode, despite the fact that state law treated the two as separate sovereignties." *Wheeler*, 435 U.S. at 318.

Thus, *Waller* makes clear that two government entities may be treated as separate "sovereigns" for some purposes and not be treated as "dual sovereigns" for purposes of the Double Jeopardy Clause. That principle—that sovereign status is not immutable—underlies both *Bartkus* and *Wheeler*.

The common thread that precluded application of the dual sovereignty doctrine in all those cases "was not the extent of control exercised by one prosecuting authority over the other but rather the *ultimate source of the power* under which the respective prosecutions were undertaken." *Id.* at 320 (emphasis added). In the *Wheeler* case, this Court found that "the sovereign power to punish tribal offenders has never been given up by the Navajo Tribe and that tribal exercise of that power today is therefore the continued exercise of retained tribal sovereignty." *Id.* at 323-24. Thus, because the "power to punish offenses against tribal law . . . was part of the Navajos' primeval sovereignty, has never been taken away from them . . . and is attributable *in no way to any delegation to them of federal authority*," the Court concluded that the dual sovereignty doctrine was applicable. *Id.* at 328 (emphasis added).

The Court in *Wheeler* expressly declined to offer an opinion on the "interesting question" whether the outcome would have been different if the prosecuting entity—in that case the Navajo tribe—had been "deprived" of its

right to enforce certain laws (*i.e.*, its "sovereignty") by Act of Congress and then regained that right pursuant to congressional delegation. *Id.* at 328, n.28. This case presents just that issue.

Unlike the Navajo tribal court, whose primeval sovereignty to punish tribal offenders was affirmed in *Wheeler*, the Commonwealth of Kentucky has no independent right to enact and enforce laws regulating the handling or emission of asbestos on any terms and conditions it chooses. The Clean Air Act specifically deprives the state of enforcement authority (42 U.S.C. § 7416) and then "regrants" that authority to the states—subject to federal approval, oversight and conditions. See *supra* pp. 2-4. Thus, while this Court in *Wheeler* found no "explicit[] or implicit[]" divestiture of tribal court sovereignty over the matters in question, the Clean Air Act's divestiture of state sovereignty over hazardous air pollutant regulation is explicit. 42 U.S.C. § 7416. And, while the Court in *Wheeler* found no federal delegation of power to the tribal court over the matter in question, *id.* at 327, the state enforcement authority at issue in this case is derived directly from the federal government, and then only upon EPA review and approval. 42 U.S.C. § 7412(d)(1).

In sum, the Commonwealth of Kentucky, like the Navajo tribe, is undoubtedly a "sovereign" entity. However, unlike the Navajo tribe in the *Wheeler* case, Kentucky—and its subdelegatee, the Board—are not enforcing their own sovereign authority when they act pursuant to Clean Air Act delegation. Kentucky's hazardous air pollutant laws were passed pursuant to, and are only enforceable under, the federal authority delegated to them. 42 U.S.C. § 7412(d) (1988); see also *Delegation Notice*, 42 Fed. Reg. 64,736 (1977). The Kentucky legislature adopted the specific federal asbestos standards found in 40 C.F.R. 61, Subpart M, verbatim. 401 K.A.R. 57:011 § 2, C.A. App. 204. These standards were also adopted

by the Board as its own regulations. A.P.C. 5.04, C.A. App. 212. These are the identical standards—*i.e.*, the same "substantive" law—that the federal government now wishes to enforce against petitioners. Superseding Indictment, C.A. App. 4.

Congress certainly was entitled to choose to proceed under the enforcement scheme of the Clean Air Act, which extracted certain intrinsic authority from the states and replaced it with the authority to enforce federally-approved standards pursuant to delegated federal authority. However, " 'dual sovereignty' . . . does not permit a single sovereign to impose multiple punishment for a single offense merely by the expedient of establishing multiple political subdivisions with the power to punish crimes." *Wheeler*, 435 U.S. at 322. The Double Jeopardy Clause does not permit the federal government to punish petitioners twice by delegating concurrent enforcement authority to the states for prosecution and then, depending on their satisfaction with the results achieved, to prosecute petitioners again. Because the issue reserved in *Wheeler* is essentially presented in this case, review by this Court of the holding below that the Double Jeopardy Clause is no bar to this prosecution is important.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 90-6026

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LOUISVILLE EDIBLE OIL PRODUCTS, INC. also known as LOUISVILLE E.O.P., INC.; PRESIDENTIAL, INC.; FRANK REED METTS; A. DEAN HUFF; RAYMOND CARL MARRILLIA, JR., also known as SAMMY MARRILLIA,
Defendants-Appellants.

Argued Jan. 24, 1991

Decided March 1, 1991

Joseph M. Whittle, U.S. Atty., Richard A. Dennis, Asst. U.S. Atty., Louisville Ky., James B. Gelin, Vicki B. Plaut (argued), U.S. Dept. of Justice, Land & Natural Resources Div., Paul S. Rosenzweig, U.S. Dept. of Justice, Environmental Crimes Section, Washington, D.C., for plaintiff-appellee.

Frank E. Haddad, Jr. (argued), Louisville, Ky., for defendants-appellants.

Before MARTIN and KRUPANSKY, Circuit Judges, and PECK, Senior Circuit Judge.

BOYCE F. MARTIN, Jr., Circuit Judge.

We have before us the denial of a motion to dismiss a nine count indictment charging asbestos related violations of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* Defendants claim this federal prosecution is barred by the double jeopardy clause of the fifth amendment because previous fines levied by a local environmental enforcement agency were, in effect, federal punitive measures carried out through a state agency to regulate the same conduct. Defendants also argue that prosecution under both the Clean Air Act and the Comprehensive Environmental Act violates the double jeopardy clause by subjecting them to multiple prosecution for the same conduct. Because the actions taken by the federal and state government are those of independent sovereigns, and because the Clean Air Act and the Comprehensive Environmental Act encompass separate offenses requiring differing elements of proof, we affirm the judgment of the district court that double jeopardy has not attached.

Louisville Edible Oils Products is a Kentucky corporation engaged in the business of producing edible oils such as salad oil. A federal indictment charges that Louisville Edible owned two facilities in Louisville, one at 2500 South Seventh Street and the other at 1303 South Shelby Street, from which it knowingly emitted friable asbestos, an air pollutant, and demolished or renovated a stationary asbestos source in violation of the Clean Air Act and the Comprehensive Environmental Act. These actions were allegedly carried out in whole or in part by Louisville Edible and its co-defendants: Presidential, Inc., an Indiana corporation affiliated with Louisville Edible operating as its construction and demolition unit, Frank R. Metts, former Chief Executive Officer and controlling stockholder of Louisville Edible, who died August 20, 1990, A. Dean Huff, director and President of Presidential and Special Products Manager of Louisville Edi-

ble, and Raymond Carl Marillia, Jr., director and Secretary Treasurer of Presidential and Vice President for Facilities Management of Louisville Edible. Defendants conced[illegible] that each facility contained equipment insulated with asbestos which may have emitted asbestos into the air during the removal process.

The local environmental enforcement agency, the Jefferson County Air Pollution Control District, had repeatedly fined Louisville Edible for its disregard of state environmental legislation. Beginning in April of 1977, the Air Pollution Board fined Louisville Edible $25,000 for the release of asbestos from its Seventh Street facility. Louisville Edible was cited on several other occasions and was fined an additional $24,000 in July of 1988 for an illegal renovation of the asbestos containing facility at Shelby Street. Another $125,000 was assessed against Louisville Edible in July of 1989 for asbestos violations at both facilities. These fines were levied only against Louisville Edible.

In their motion to dismiss, defendants asserted that the magnitude of the Air Pollution Board fines evidenced an intent to criminally punish Louisville Edible. On this premise, defendants argued that the federal indictment based on the same conduct is barred as successive prosecution under the double jeopardy clause analysis of *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) (concluding that imposition of civil fine subsequent to criminal prosecution may trigger double jeopardy protection if that fine is punitive in nature and aimed at the same conduct); *see also Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (prohibiting multiple prosecutions by a sovereign for a single offense). Defendants also challenged the Clean Air Act and the Comprehensive Environmental Act counts, claiming they are multiple prosecutions for the same conduct under *Grady v. Corbin*, —— U.S. ——, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) (Double jeopardy

clause prohibits subsequent prosecution in which the government must prove as an essential element of the charged offense conduct for which the defendant has already been prosecuted).

The district court rejected these arguments and we agree. Defendants' *Halper* claim was rejected without reaching the issue of whether the fines levied against Louisville Edible constituted punishment for double jeopardy purposes because the dual sovereignty exercised by the federal government and the Air Pollution Board eliminates any double jeopardy concern. The court also found no merit to the defendants' argument that *Grady* prevented prosecution on both the Clean Air Act and the Comprehensive Environmental Act counts because it found each charge to be a separate offense requiring differing elements of proof.

As a preliminary issue, we must confront Presidential, Huff, and Marrillia's claim that they are somehow protected by the double jeopardy clause if we find the penalties assessed against Louisville Edible to be punitive under *Halper*. It is well established that the protection of the double jeopardy clause is "intrinsically personal." *Halper*, 109 S.Ct. at 1901. However, defendants argue that Louisville Edible's corporate structure as a Subchapter S corporation, 26 U.S.C. § 1361 *et seq.*, extends any protection from prosecution granted to Louisville Edible to them as well. As employees of a Subchapter S corporation, Huff and Marrillia are employed by Louisville Edible on a direct percentage of profits basis. Therefore, defendants argue, any penalty accessed against Louisville Edible was passed directly onto them, precluding further punishment for the same conduct.

Subchapter S is merely a taxing statute under which small closely-held corporations may avoid tax liability by treating shareholders as partners in determining that shareholder's individual tax liability based on his or her pro rata share of the corporation's items of income,

loss, deduction or credit. 26 U.S.C. § 1366(a)(1)(A). Subchapter S corporations do not give their employees or shareholders any unique double jeopardy protection. Indeed, taking defendants' argument on its face would allow any individual who gains income on a pro rata basis, whether employed by a subchapter S or not, to claim double jeopardy protection when the income producer has been punished. We agree with the district court that the:

> constitutional protection against double jeopardy to which the *Halper* court referred does not extend to the defendants Presidential, . . . Huff, and Marrillia.
>
> Except for applauding the ingenuity of counsel, we reject his first argument.

Thus as to all of the defendants except Louisville Edible there is no second prosecution.

The next basic issue in controversy is whether *Halper* bars the United States prosecution of Louisville Edible because of the penalties assessed by the Jefferson County Board. *Halper* addressed the issue of whether a civil sanction following a criminal conviction for the same conduct would violate the double jeopardy clause of the fifth amendment. 109 S.Ct. at 1892. The United States charged Halper with submitting 65 false claims for Medicare reimbursement, in violation of 18 U.S.C. § 287. As a result of Halper's conduct, the government suffered a total loss of $585. He was sentenced to two years in prison and fined $5,000.

After the criminal proceedings were complete, the United States brought a civil action under the False Claims Statute, 31 U.S.C. §§ 3729-3731, which authorized a penalty of $2,000 per violation, double the damages sustained by the government, and costs. The district court found that the subsequent civil fine imposed of over $130,000 was so severe as to violate the double jeopardy clause

as additional punishment for the same conduct for which Halper had been earlier prosecuted. On review it was stated that although civil penalties do not ordinarily rise to the level of punishment, there exists

> the possibility that in a particular case a civil penalty authorized by the Act may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment. . . . Under the Double Jeopardy Clause, a defendant who already has been punished with criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be categorized as remedial but only as a deterrent or retribution.

Id. at 1898-1902.

Louisville Edible claims that *Halper* should apply in this case to bar prosecution of its asbestos violations because the fines imposed by the Air Pollution Board for this same conduct were so disproportionate to any remedial purpose as to constitute punishment under the double jeopardy clause. This claim is misplaced; the double jeopardy clause of the fifth amendment bars only additional prosecution by the same sovereign. *Heath v. Alabama*, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985). Even if the fines levied by the Jefferson County Board were so severe as to be punitive under *Halper*, federal prosecution of the same conduct subsequent to that punishment would not offend the double jeopardy clause because of the dual sovereignty possessed by the state and the federal government over this matter. *See* 42 U.S.C. § 7416 (authorizing state development and enforcement of emissions standards).

The dual sovereignty doctrine holds that the double jeopardy clause "does not apply to suits by separate sovereigns, even if both are criminal suits for the same offense." *United States v. A Parcel of Land, Etc.*, 884 F.2d 41, 43 (1st Cir.1989). The doctrine is based on the premise that

> [w]e have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

United States v. Lanza, 260 U.S. 377, 382, 43 S.Ct. 141, 142, 67 L.Ed. 314 (1922). Here the state prosecution was directed by the Air Pollution Board, which derives its jurisdiction from state law (Ky.Rev.Stat.Ann. § 77.005 *et seq.* (Michie/Bobbs-Merrill 1980)); as a state actor the Air Pollution Board is a "separate sovereign[] with respect to the Federal Government because each state's power to prosecute is derived from its own 'inherent sovereignty,' not from the federal government." *Heath*, 474 U.S. at 88, 106 S.Ct. at 437 (citing *United States v. Wheeler*, 435 U.S. 313, 320, n. 14, 98 S.Ct. 1079, 1084, n. 14, 55 L.Ed.2d 303 (1978)). Accordingly, the Jefferson County Air Pollution Board and the United States, through the Environmental Protection Agency, may each pursue claims against Louisville Edible for the same conduct without subjecting the defendant to double jeopardy.

Louisville Edible argues that the dual sovereignty doctrine does not apply in this case because the Air Pollution Board and the United States Environmental Protection Agency were not acting as separate entities; but rather, that the Jefferson County Board was acting as a "tool" for federal enforcement. *See, e.g., Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) (discussing exception to dual sovereignty doctrine where state prosecution is merely a "cover and tool of federal authorities"). Louisville Edible claims that correspondence between the Chief of Air Compliance of Region IV of the

Environmental Protection Agency, and the Secretary-Treasurer of the Air Pollution Control District for Jefferson County, establishes that the local agency was acting at the direction of the Environmental Protection Agency in imposing civil fines.

We agree with the district court that a review of these documents does not suggest that the Jefferson County Air Pollution Board was acting as a conduit for federal government enforcement. Indeed, these documents establish that the Board rejected a number of the Environmental Protection Agency's recommendations, including a request to defer prosecution pending Agency action. Rather than acting as a "tool," the Board engaged in inter-sovereign dialogue before pursuing its own prosecution. *See Bartkus*, 359 U.S. at 123, 79 S.Ct. at 678 (discussing benefits of federal-state cooperation in law enforcement).

The Environmental Protection Agency has no statutory authority to control the actions of the local board. *See* 42 U.S.C. §§ 7401, 7412(d), 7416; Clean Air Act § 112(d); Ky.Rev.Stat.Ann. § 77.010 (Michie/Bobbs-Merrill 1980). Indeed, the record demonstrates that the Jefferson County Board often conflicted with the Environmental Protection Agency over the way to properly address Louisville Edible's actions, before the Environmental Protection Agency determined to initiate its own claim.

The last issue Louisville Edible raises deals solely with its double jeopardy concerns regarding the federal prosecution alone. Louisville Edible asserts that the Comprehensive Environmental Act and Clean Air Act claims are predicated on the same conduct, and thus are barred by *Grady v. Corbin*, —— U.S. ——, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). We disagree. We read *Grady* as barring successive prosecutions for the same offense, not simultaneous prosecutions for separate offenses. *Id.* 110 S.Ct. at 2095 (discussing states' ability to proceed against defendant in a single proceeding asserting multiple

claims). We find nothing in *Grady* to alter the established principle that

> where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).

We agree with the conclusion reached by the district court:

> A conviction under the Clean Air Act requires the government to prove either that defendants emitted asbestos into the atmosphere or that they violated the work practice standards adopted by the Environmental Protection Agency, Title 42 U.S.C. § 7412(e). See 40 C.F.R. § 61.140 *et seq.*
>
> To obtain a conviction under CERCLA requires the government to prove that defendants were in charge of the facility from which a hazardous substance was released and that they failed to notify immediately the appropriate agency as soon as they had knowledge of the release. Title 42 U.S.C. § 9603. (footnote omitted).
>
> It is apparent that each offense charged requires proof of an element which the other offense does not.

Accordingly, we find the indictment does not violate the double jeopardy clause by including both the Clean Air Act and the Comprehensive Environmental Act charges.

All other claims are without merit.

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Cr 90-00048-L(B)

UNITED STATES OF AMERICA,
Plaintiff

v.

LOUISVILLE EDIBLE OIL PRODUCTS, INC., *et al.*,
Defendants

MEMORANDUM AND ORDER

[Entered Aug. 3, 1990]

This matter is before the Court on the motion of the defendants to dismiss Counts 1 through 7 of the superseding indictment. Defendants argue that the indictment violates the Double Jeopardy Clause of the Fifth Amendment.

BACKGROUND

The superseding indictment charges defendants with 9 counts of violating the Clean Air Act, Title 42 U.S.C. § 7401 *et seq.*, and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), also known as the "Superfund."

Named as defendants are Louisville Edible Oil Products (LEOP), Presidential, Inc., Frank Reed Metts, A. Dean Huff, and Raymond Carl Marrillia, Jr. LEOP is a Kentucky corporation engaged in the business of producing, as its name implies, edible oil products such as salad oil. Presidential is an Indiana corporation which functions as

the construction and demolition arm of LEOP. Metts is Chief Executive Officer and controlling stockholder of LEOP. Huff is a director and President of Presidential and Special Products Manager of LEOP. Marrillia is a director and Secretary Treasurer of Presidental and Vice President for Facilities Management of LEOP.

Count 1 charges that LEOP owned two facilities in Louisville. One of the facilities is at 2500 South Seventh Street (the Seventh Street Facility) and one is at 1303 South Shelby Street (the Shelby Street Facility). It is further alleged that the Shelby Street Facility was sold in March, 1989, to Market Street Financial Company, Inc., of which defendant Metts is President.

Count 1 charges further that in September and October, 1986, LEOP, Presidential, Metts and Huff knowingly emitted from the Seventh Street Facility friable asbestos, an air pollutant, and demolished or renovated a stationary source in violation of the Clean Air Act.

Count 2 charges the same defendants with violation of CERCLA in September and October, 1986, at the Seventh Street Facility.

Count 3 charges all defendants with violation of the Clean Air Act in August, 1988, at the Seventh Street Facility.

Count 4 charges all defendants with violation of CERCLA in August, 1988, at the Seventh Street Facility.

Count 5 charges all defendants with a violation of the Clean Air Act in April, 1988, at the Shelby Street Facility.

Count 6 charges all defendants with violation of the Clean Air Act in September, 1988, at the Shelby Street Facility.

Count 7 charges all defendants with violation of CERCLA in September, 1988, at the Shelby Street Facility.

Defendants state that the two facilities are older facilities constructed before the hazardous nature of asbestos fibers became generally known. Defendants concede that each facility contained equipment insulated with asbestos. They further concede for the purposes of this motion that, during renovation of the facilities some asbestos was "possibly" permitted to escape by the firm LEOP had retained to remove the asbestos.

Defendants next argue that they were cited on at least three occasions by the Jefferson County Air Pollution Control District (JCAPCD). They assert that, as a result of the events charged in Counts 1 and 2, JCAPCD assessed a find of $25,000, which was paid by LEOP. As a result of the events charged in Count 5, LEOP was fined $24,000, which it paid. As a result of the events charged in Count 3, 4, 6 and 7, a fine of $125,000 was assessed and was paid by LEOP in two installments.

Defendants argue that the fines are punitive in nature by virtue of their magnitude and that further prosecution under this indictment is barred by the Double Jeopardy Clause of the Fifth Amendment.

DISCUSSION

In *United States v. Halper*, —— U.S. ——, 109 S.Ct. 1892 (1989), the Court addressed the Double Jeopardy Clause in a case in which a civil sanction was imposed in addition to criminal punishment.

In *Halper* defendant was charged with submitting 65 false claims for reimbursement under Medicare. The total loss to the government was $585.00. Halper was named in an indictment charging him with 65 counts of violating the criminal False Claims Statute, Title 18 U.S.C. § 287. He was found guilty on all those counts and on an additional 16 counts of mail fraud. He was sentenced to two years in prison and fined $5,000.

The government then brought an action under the civil False Claims Statute, Title 31 U.S.C. 3729-3731. The

remedial portion of the statute provided for a civil penalty of $2,000 per violation, double the damages sustained by the government, and the costs of the action.

The district court held that the imposition of civil penalties of over $130,000 against Halper would constitute double jeopardy.

On direct appeal to the Supreme Court—taken prior to the repeal of Title 28 U.S.C. § 1252—the government argued that the Double Jeopardy Clause did not bar assessment of a civil penalty. In rejecting that argument, the Court held that although, as a general proposition, civil penalties do not rise to the level of punishment, "the possibility that in a particular case a civil penalty authorized by the Act may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment." —— U.S. at ——, 109 S.Ct. at 1898.

The *Halper* Court then refined the question before it: "whether and under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause." —— U.S. at ——, 109 S.Ct. at 1901. The Court rejected the notion that consideration of statutory language structure and intent was appropriate in deciding the applicability of double jeopardy safeguards:

> "[W]hile recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not will suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments. (Citation omitted). This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state."

—— U.S. at ——, 109 S.Ct. at 1901. The Court held that: "Under the Double Jeopardy Clause, a defendant

who already has been punished with criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be categorized as remedial but only as a deterrent or retribution." —— U.S. at ——, 109 S.Ct. at 1902.

Whether the civil sanction is or is not punishment involves an element of rough justice.

The Court also limited its holding to the rare case where a prolific but small-gauge offender is subjected to a sanction overwhelmingly disproportionate to the damages he has caused.

The threshold question which troubles the Court concerns the applicability, for double jeopardy purposes, of the fines paid only by LEOP.

The second question of concern is whether the several sanctions imposed by JCAPCD triggered double jeopardy defenses against the United States.

The third question is whether the indictment charging violation of the Clean Air Act and CERCLA amounts to multiple prosecutions for the same offense.

Turning to our first question, we find guidance from *Halper* in the holding quoted above that the protection of the Double Jeopardy Clause is "intrinsically personal."

Defendants advance the novel argument that since LEOP is a Subchapter S corporation, Title 26 U.S.C. § 1361 et seq., and defendant Metts is the holder of 36% of the stock in LEOP, the corporate shield argument of the government is to no avail.

Defendant's further argue that since defendants Huff and Marrillia are compensated on a percentage-of-profits basis, a fine against LEOP translates into a fine against them.

Not surprisingly, there is a dearth of authority addressing the precise point.

We reject defendant's Subchapter S argument. Subchapter S is a taxing statute under which the shareholders are effectually treated as partners for the purposes of calculating their individual tax liability. Included in the determination of tax liability are the shareholders' pro rata share of the corporation's items of income, loss, deduction or credit. Title 26 U.S.C. § 1366(a)(1)(A). The statute's purpose is to eliminate any tax liability of small closely-held corporations by passing the corporate income directly to the shareholders.

The Court finds that the intrinsically personal nature of the constitutional protection against double jeopardy to which the *Halper* court referred does not extend to the defendants Presidential, Metts, Huff and Marrillia.

Except for applauding the ingenuity of counsel, we reject his first argument.

We next address the question whether the penalties assessed by JCAPCD bar prosecution of defendant LEOP by the United States.[1]

We return briefly to *Halper* to note that both the criminal prosecution and the civil action against *Halper* were commenced by the United States. That situation does not exist here. The administrative proceedings resulting in LEOP's paying the fines were commenced by Jefferson County, and the criminal prosecution before this Court was commenced by the United States.

In *Heath v. Alabama*, 474 U.S. 82, 106 S.Ct. 433 (1985), the Court addressed the question:

> "[W]hether the dual sovereignty doctrine permits successive prosecutions under the laws of different States which otherwise would be held to 'subject [the defendant] for the same offence to be twice put in

[1] Since the Court has concluded that the fines against LEOP do not cloak the other defendants with double jeopardy immunity, our discussion will be limited to LEOP's double jeopardy argument.

> jeopardy.' U.S. Const., Amdt. 5. Although we have not previously so held, we believe the answer to this query is inescapable. The dual sovereignty doctrine, as originally articulated and consistently applied by this Court, compels the conclusion that successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause."

474 U.S. at 88, 106 S.Ct. at 437.

The Court went on to hold "that the States are separate sovereigns with respect to the Federal Government because each state's power to prosecute is derived from its own 'inherent sovereignty,' not from the federal government." (Citing *United States v. Wheeler*, 435 U.S. 313, 320, n. 14, 98 S.Ct. 1079, 1084, n. 14 (1978)).

Further support of the proposition that the dual sovereignty doctrine does not bar dual prosecutions under the Double Jeopardy Clause may be found in *United States v. A Parcel of Land, Etc.*, 884 F.2d 41 (1st Cir. 1989):

> "The doctrine of Double Jeopardy does not apply to suits brought by separate sovereigns, even if both are criminal suits for the same offense. The appellants were convicted for possession of marijuana with intent to distribute and for the cultivation of marijuana in the Superior Court of the Commonwealth of Massachusetts, a sovereignty separate from the federal government. Therefore, even if the federal government had brought a *criminal* case against the appellants on the basis of the same acts, such a case would not be barred by Double Jeopardy."

884 F.2d at 43.

It cannot be seriously argued that JCAPCD and the U.S. Environmental Protection Agency are not separate entities. KRS Chapter 77 provides for the establishment of an air pollution control district in each county, KRS 77.010, and that the district has the authority to "make

and enforce all needful orders, rules and regulations necessary or proper to accomplish the purposes of this chapter for the administration of such district . . . ." KRS 77.180(1).[2]

The Court concludes that the teaching of *Health* mandates the conclusion that the dual sovereignty doctrine defeats any double jeopardy defense raised by LEOP.

Finally, we address defendants' argument that Counts 2, 4 and 7 charging CERCLA violations are based on the same conduct charged in Counts 1, 3 and 6 charging Clean Air Act violations and therefore amount to multiple prosecutions for the same offenses in contravention of the Double Jeopardy Clause.

In support of their argument, defendants rely on two recent cases, *Grady v. Corbin*, —— U.S. ——, 110 S.Ct. 2084 (1990), and *Costo v. United States*, 904 F.2d 344 (6th Cir. 1990). This reliance is misplaced.

Grady involved an automobile accident in which defendant crossed the center line of a highway and struck two cars. The accident was investigated by an Assistant District Attorney who went to the scene. Later that evening, he learned that the driver of one of the cars defendant had struck had died. Thereafter, defendant was charged in two traffic citations with driving under the influence and driving on the wrong side of the road. Apparently, the bureaucracy in the District Attorney's Office strangled on its own red tape and when the citations came before a local court, the court was not told of the death of the driver of the car defendant had struck.

Defendant entered guilty pleas to the two citations and, owing to a further mix-up in the District Attorney's Office, the prosecutor at defendant's sentencing was either unaware of the fatality or she was unaware that a

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[2] The establishment of state agencies to adopt and enforce standards respecting emissions of air pollutants and controlling air pollution is authorized by Title 42 U.S.C. § 7416.

homicide prosecution was being instituted. She recommended a "minimum sentence," which the Court imposed. Thereafter, defendant was indicted on several charges, including reckless manslaughter, second degree vehicular manslaughter, and criminally negligent manslaughter.

In holding that the Fifth Amendment barred prosecution under the indictment, the Court wrote:

> "[T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an 'actual evidence' or 'same evidence' test. *The critical inquiry is what conduct the State will prove*, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. See *Dowling v. United States*, 493 U.S. ——, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). On the other hand, a State cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct." (Emphasis added.)

—— U.S. at ——, 110 S.Ct. at 2093.

The Court then urged caution and attention on the part of prosecutors to avoid the pitfalls which led to the release of the defendant:

> "With adequate preparation and foresight, the State could have prosecuted Corbin for the offenses charged in the traffic tickets and the subsequent indictment in a single proceeding, thereby avoiding this double jeopardy question. . . . we are confident that with proper planning and attention prosecutors will be able to meet this standard and bring to justice those who make our Nation's roads unsafe."

—— U.S. at ——, 110 S.Ct. at 2095.

We read *Grady* as barring successive prosecutions, not separate prosecutions for separate offenses. The case before this Court does not involve successive prosecutions.

The Court likewise finds little comfort for defendants in *Costo*. In that case, the Court reversed consecutive sentences imposed for the distribution of cocaine and attempted distribution of cocaine arising out of the delivery of cocaine to an informant and the attempt to distribute more cocaine to the same informant at the same time and the same place.

The Court relied on the now well-settled rule announced in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932):

> "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

284 U.S. at 304, 52 S.Ct. at 182.

The *Costo* Court then cited with approval the holding in *United States v. Palafox*, 764 F.2d 558 (9th Cir. 1985) (*en banc*), in which the Court held that when separate offenses were charged in a single transaction, verdicts of guilty may be returned on all counts but defendant may be punished on only one.

Further militating against defendant's argument is the applicability of the *Blockburger* test.

A conviction under the Clean Air Act requires the government to prove either that defendants emitted asbestos into the atmosphere or that they violated the work practice standards adopted by EPA, Title 42 U.S.C. § 7412(e). See 40 C.F.R. § 61.140 *et seq.*

To obtain a conviction under CERCLA requires the government to prove that defendants were in charge of

the facility from which a hazardous substance was released and that they failed to notify immediately the appropriate agency as soon as they had knowledge of the release. Title 42 U.S.C. § 9603.[3]

It is apparent that each offense charged requires proof of an element which the other offense does not.

The Court rejects defendants' third argument.

CONCLUSION

The motion to dismiss Counts 1 through 7 of the superseding indictment will be denied. Because denial of a motion to dismiss on grounds of double jeopardy is immediately appealable, *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034 (1977), see also *United States v. Sinito*, 723 F.2d 1250 (6th Cir. 1983), *cert. denied*, 469 U.S. 817, 105 S.Ct. 86 (1984), the Court will defer assigning this matter for further proceedings until the time for appeal has expired or until receipt of the mandate on appeal, whichever first occurs.

IT IS SO ORDERED this 3rd day of August, 1990.

/s/ Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to counsel

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[3] Whether a conviction under Count 2 is punishable as a misdemeanor or as a felony is a question we leave for another day.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 90-6026

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LOUISVILLE EDIBLE OIL PRODUCTS, INC., ETC., *et al.*,
Defendants-Appellants

ORDER

[Filed Apr. 15, 1991]

MARTIN and KRUPANSKY, Circuit Judges; and PECK, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

(2)

FILED
AUG 26 1991
OFFICE OF THE CLERK

No. 91-76

In the Supreme Court of the United States

OCTOBER TERM, 1991

LOUISVILLE EDIBLE OIL PRODUCTS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the United States from initiating a criminal prosecution under the Clean Air Act against a corporation that has paid a civil penalty for the same conduct to a local government agency pursuant to state law.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 926 F.2d 584. The memorandum opinion and order of the district court (Pet. App. 10a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1991. A petition for rehearing was denied on April 15, 1991. The petition for a writ of certiorari was filed on July 12, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

The Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, establishes a comprehensive national program for regulating air quality, and it authorizes federal criminal prosecutions for intentional violations of specific statutory provisions. In this case, petitioners Louisville Edible Oil Products, Inc. (LEOP), an affiliate of LEOP, and certain corporate officers were indicted in the United States District Court for the Western District of Kentucky on charges that they violated federal standards regulating asbestos emissions. Petioners moved to dismiss seven counts of the indictment, arguing that the Double Jeopardy Clause barred federal prosecution on those counts because LEOP had previously paid civil penalties to a local goverment agency, the Air Pollution Control District of Jefferson County (the Jefferson County Board), based on the same conduct. The district court rejected that contention, Pet. App. 10a-20a, and the court of appeals affirmed, *id.* at 1a-9a.

1. The Clean Air Act sets forth special provisions for the regulation of especially dangerous air pollutants. At the time relevant to the events here, Section 112 of the Clean Air Act required the Administrator of the Environmental Protection Agency (EPA) to publish a list of "hazardous air pollutants" and to prescribe emission standards or other requirements for those pollutants to protect the public health with an adequate margin of safety. 42 U.S.C. 7412(a), (b), and (e).[1]

---

[1] Congress has since amended the Clean Air Act, effective November 15, 1990, and has comprehensively revised Section 112. See The Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 301, 711(b), 104 Stat. 2531-2574, 2684. The issues in this case are subject to the prior statutory provisions, and

The Administrator has listed asbestos as a hazardous air pollutant, 38 Fed. Reg. 8820 (1971), and has prescribed stringent limitations to protect the public from asbestos exposure, 40 C.F.R. 61.140-61.156. The Clean Air Act requires all persons to comply with the Administrator's limitations, CAA § 112(c), 42 U.S.C. 7412(c), and it provides various means for federal civil enforcement, CAA § 113 (a)(3), 42 U.S.C. 7413(a)(3). The Clean Air Act also authorizes the United States to bring a criminal prosecution for knowing violations. CAA § 113(c) (1)(C), 42 U.S.C. 7413(c)(1)(C).

2. The Clean Air Act gives the States the option of developing and submitting their own procedures to implement and enforce hazardous air pollutant emission standards within their borders. CAA § 112(d)(1), 42 U.S.C. 7412(d)(1). Section 112(d) provides that "[i]f the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards." 42 U.S.C. 7412 (d)(1). Section 112(d) further provides, however, that "[n]othing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section." 42 U.S.C. 7412 (d)(2).

The Commonwealth of Kentucky has adopted a state program for air pollution control that is consistent with the Clean Air Act. See Ky. Rev. Stat. Ann. §§ 77.005 *et seq.* (Michie/Bobbs-Merrill 1980 & Supp. 1990). In addition, the Kentucky Natural Resources and Environmental Protection Cabinet and the Jefferson County Board have promulgated regu-

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we shall limit our discussion (except where specifically noted) to the requirements of the prior law.

lations to control hazardous air pollutants, including asbestos. 401 Ky. Admin. Regs. 57:011, 63:042 (1990); Jefferson County Board Reg. 5.04, 5.13 (Jan. 1988). Those regulations adopt the EPA's standards and also impose additional requirements. See C.A. App. 204-211, 212-226.

The Administrator of the EPA has determined that Kentucky's laws and regulations provide an adequate and effective procedure for implementing and enforcing hazardous air pollutant emission standards. See 42 Fed. Reg. 64,735 (1977). He accordingly has delegated to Kentucky the EPA's responsibility under the Clean Air Act for regulating those pollutants. Under that delegation, Kentucky administers a hazardous air pollutant program under its own laws and regulations. The Administrator has reserved, however, his authority to enforce the federal standards as a matter of federal law. *Ibid.*

3. Petitioners are in the business of producing cooking, salad, and other edible oils. In 1986, they began relocating a processing facility within Jefferson County, Kentucky, and participated in the dismantlement of processing equipment that was insulated with asbestos. The Jefferson County Board determined that petitioner LEOP had failed to comply with the Board's asbestos regulations and issued a series of civil citations. Between 1986 and 1989, LEOP entered into three settlements with the Board and paid civil penalties in the aggregate amount of $174,000. Pet. App. 2a-3a, 10a-12a. See C.A. App. 136-166.

In 1990, a federal grand jury returned a nine-count indictment charging petitioners with criminal violations of the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Li-

ability Act (CERCLA), 42 U.S.C. 9601 *et seq.* Petitioners moved to dismiss seven of the nine counts. They argued that the Double Jeopardy Clause barred a federal prosecution based on their asbestos removal activities because the Jefferson County Board had assessed civil penalties against petitioner LEOP pursuant to the Board's local asbestos regulations, which had adopted the federal standards. Pet. App. 2a-3a, 10a-12a.

The district court denied the motion to dismiss. The court first concluded that only LEOP, which had paid the civil penalties, could raise a double jeopardy contention. Pet. App. 14a-15a. The court next concluded that the dual sovereignty doctrine, which provides that the federal and state governments may separately prosecute the same conduct, precluded LEOP's double jeopardy defense. *Id.* at 15a-17a. The court also rejected petitioners' contention that the Clean Air Act counts and the CERCLA counts constitute multiple prosecutions for the same offenses. *Id.* at 17a-20a.

Petitioners took an interlocutory appeal from the district court's order, and the court of appeals affirmed for essentially the same reasons given by the district court. Pet. App. 4a-9a. The court of appeals first agreed that a double jeopardy defense would be available—if at all—only to LEOP, which was the object of the local enforcement action. *Id.* at 4a-5a. The court then concluded that even if the Jefferson County Board's assessment of civil penalties amounted to a "prosecution" for double jeopardy purposes, cf. *United States* v. *Halper*, 490 U.S. 435 (1989), "federal prosecution of the same conduct subsequent to that punishment would not offend the double jeopardy clause because of the dual sover-

eignty possessed by the state and the federal government over this matter." Pet. App. 6a. The court observed that the Board's action here was based on its independent authority under state law and that the EPA had no statutory authority to control the Board's actions. *Id.* at 7a-8a. The court of appeals also rejected petitioners' renewed contention that the Clean Air Act counts and the CERCLA counts constitute multiple prosecutions for the same offenses. *Id.* at 8a-9a.

ARGUMENT

Petitioners contend that the Double Jeopardy Clause bars the United States from prosecuting them for criminal violations of the Clean Air Act. The court of appeals correctly rejected that contention, concluding that even if the federal and state enforcement actions amounted to two prosecutions for purposes of double jeopardy analysis, the well-established dual sovereignty doctrine would allow the federal and state governments to bring separate criminal proceedings for the same conduct. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals, nor does it otherwise warrant this Court's review.

1. Petitioners acknowledge that "the Double Jeopardy Clause does not generally apply to multiple prosecutions by separate sovereign governments" because, under the dual sovereignty doctrine, "a single act can be viewed as a transgression against the authority of more than one sovereign." Pet. 10. As this Court has explained:

> The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the "peace

> and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences." *United States v. Lanza*, 260 U.S. 377, 382 (1922). As the Court explained in *Moore v. Illinois*, 14 How. 13, 19 (1852), "[a]n offence, in its legal signification, means the transgression of a law." Consequently, when the same act transgresses the laws of two sovereigns, "it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences; for each of which he is justly punishable." *Id.*, at 20.

Heath v. *Alabama*, 474 U.S. 82, 88 (1985).

In this case, petitioners are subject to separate federal and local enforcement actions because their conduct "transgresses the laws of two sovereigns." The federal indictment alleges that petitioners have violated the Clean Air Act by emitting a hazardous air pollutant in violation of federal emission standards. C.A. App. 6. See CAA § 112(c)(1)(B) and (e)(5), 42 U.S.C. 7412(c)(1)(B) and (e)(5); 40 C.F.R. 61.140-61.156. The Jefferson County Board's notices of violation, by contrast, allege violations of the Board's local regulations. See C.A. App. 136, 137, 141, 142, 143, 144, 151, 152, 153, 154, 155. Hence, the separate federal and local enforcement actions charge separate offenses that are separately punishable.

2. Petitioners nevertheless contend that the Double Jeopardy Clause should apply because the Board, "while ostensibly operating to enforce its own laws, was in reality operating as an agent of Congress and enforcing national emission standards on behalf of the EPA." Pet. 12. Petitioners' argument, however, is inconsistent with this Court's analysis in *Heath*. As the Court explained,

> the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the two entities draw their authority to punish the offender from distinct sources of power.

474 U.S. at 88. Here, the United States and the Commonwealth of Kentucky draw their authority to enact their respective laws from distinct sources. See *id.* at 89. Congress enacted the Clean Air Act based on its constitutionally conferred powers, while Kentucky and (derivatively) the Board promulgated their asbestos regulations based on the Commonwealth's "inherent" sovereign power to enact laws governing public health and safety. *Ibid.* See, *e.g.*, *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 601 (1982) (recognizing the States' "sovereign power * * * to create and enforce a legal code, both civil and criminal"). The "reality" of the situation is that the United States and the Board have pursued their separate enforcement actions under separate exercises of sovereign authority. "Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." *United States* v. *Lanza*, 260 U.S. 377, 382 (1922).

Petitioners further assert that the United States and the Board should be treated as one sovereign because "the penalties imposed by the state were based on federal law standards, incorporated into state law by means of congressional and EPA delegation of circumscribed enforcement authority." Pet. 13. That contention also is mistaken. First, the fact that Kentucky and the Jefferson County Board relied on the federal standards in formulating their stand-

ards is irrelevant to the issue at hand. The "crucial" factor is the source of the *authority* to promulgate the regulations—not the source of the regulatory language. *Heath*, 474 U.S. at 88. "This Court has plainly and repeatedly stated that two identical offenses are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns. See, *e.g.*, *United States* v. *Lanza*, 260 U.S. 377 (1922) (same conduct, indistinguishable statutes, same 'interests')." *Heath*, 474 U.S. at 92.

Second, Congress and the EPA did not "delegate" authority to Kentucky to promulgate local regulations. Kentucky, as a sovereign State, neither needed nor relied on congressional authorization to enact local law. It "has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority." *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978). Thus, Kentucky acted, and authorized the Board to act, as an exercise of its "own sovereignty." *Ibid.* Congress may have given Kentucky an incentive to act by providing that if a State submits an adequate state mechanism for regulating hazardous air pollutants, it can *then* assume the EPA's duties within the State. CAA § 112(d), 42 U.S.C. 7412(d). Nevertheless, Kentucky remained free to decline that invitation. The State's decision to promulgate its own asbestos regulations that are enforceable as a matter of state law was purely an exercise of its own sovereign prerogatives. See *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987).[2]

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[2] Petitioners rely heavily (Pet. 11-12, 13) on a statement in *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), suggesting that a double jeopardy bar might arise if a State "in bringing its

3. Petitioners next argue that allowing separate enforcement of federal and state hazardous air pollutant standards will "substantially undermine" local government enforcement because "parties who risk duplicative federal enforcement will vigorously resist liability." Pet. 13-14. The dual sovereignty doctrine, however, does not turn on a "balancing of interests approach." *Heath*, 474 U.S. at 92. As this Court has explained, "the Federal Government has the right to decide that a state prosecution has not vindicated a violation of the 'peace and dignity' of the Federal Government." *Id.* at 93.

Furthermore, to the extent that petitioners are challenging the federal government's *exercise* of that right, their arguments are misdirected. The Clean Air Act expressly provides that the EPA's approval of a state program for hazardous air pollutant regulation does not diminish its authority to enforce "any applicable emission standard under this section."

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prosecution was merely a tool of the federal authorities" and "the state prosecution was a sham and a cover for a federal prosecution." *Id.* at 123-124. The court of appeals correctly rejected the contention that the Jefferson County Board was acting as a "tool" for federal authorities here. Pet. App. 7a-8a. Petitioners' suggestions (Pet. 12, 13) that the statement in *Bartkus* stands for a broader proposition are without support. Indeed, petitioners are unable to cite any case dismissing an indictment based on the remarks in *Bartkus*. The courts of appeals have uniformly rejected far narrower interpretations of the *Bartkus* dictum. See, *e.g.*, *United States* v. *Patterson*, 809 F.2d 244, 247-248 & n.2 (5th Cir. 1987); *United States* v. *Bernhardt*, 831 F.2d 181, 182-183 (9th Cir. 1987), cert. denied, 488 U.S. 954 (1988); *United States* v. *Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984); *United States* v. *Russotti*, 717 F.2d 27, 31 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984); *United States* v. *Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

CAA § 112(d)(2), 42 U.S.C. 7412(d)(2). Thus, Congress has authorized dual federal and state enforcement and has, in effect, rejected petitioners' policy arguments. See, *e.g.*, *Lanza*, 260 U.S. at 385 ("If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision.").[3]

4. Finally, petitioners argue that the court of appeals' decision "is inconsistent with the related double jeopardy principles articulated by this Court in *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978)." Pet. 15. That contention does not warrant this Court's review. As an initial matter, petitioners did not make this argument, or even cite *Wheeler*, in their briefs to the court of appeals. It would be inappropriate, therefore, to consider the argument for the first time in this Court. In any event, the argument is without merit.

In *Wheeler*, the Court held that the United States and the Navajo Tribe could separately prosecute a Tribe member for related criminal offenses. The Court rejected the member's argument that the United States had extinguished the Tribe's sovereign identity, and it held that Indian tribes retain certain attributes of sovereignty, including "the sovereign power to punish tribal offenders." 435 U.S. at 323. Petitioners argue that here, by contrast, the Clean Air Act extinguishes the relevant aspects of Ken-

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[3] Petitioners suggest (Pet. 14-15) that if the EPA is dissatisfied with the State's enforcement activities, it could revoke its approval of the state program. The existence of that option, however, does not foreclose the EPA from exercising its express authority under Section 112(d)(2) to bring a separate enforcement action.

tucky's sovereignty. Petitioners assert that Section 116 of the Clean Air Act, 42 U.S.C. 7416, "specifically deprives" the States of their sovereign power to regulate hazardous air pollutants and that Section 112 then " 'regrants' that authority to the conditions." Pet. 17.

Petitioners' argument rests on a mistaken understanding of the Clean Air Act. Section 116, captioned "Retention of State authority," preserves a State's right to control air pollution, but provides that a State "may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under * * * [Section 112]." 42 U.S.C. 7416.[4] Thus, Section 116 does not result in "divestiture of state sovereignty over hazardous air pollutant regulation" (Pet. 17); instead, it requires only that state regulations be no less stringent than federal regulations. As this Court expressly recognized in *Wheeler*, such partial preemptions of state authority do not diminish a State's sovereignty as to laws that are not preempted:

> [W]hile the States, as well as the Federal Government, are subject to the overriding requirements of the Federal Constitution, and the Su-

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[4] Section 116 states, as relevant here:

> [N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions or air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under * * * [Section 112], such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such * * * section.

42 U.S.C. 7416.

> premacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power.

435 U.S. at 320. Accordingly, Kentucky's promulgation of the regulations at issue here remained an exercise of its own sovereign authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONERS

The petition demonstrated that the decision below presents a substantial question under the Double Jeopardy Clause of whether a significant penalty for Clean Air Act violations imposed by a local government acting pursuant to delegated federal authority bars a later federal prosecution for the same alleged violations. Petitioners made clear that such a federal prosecution falls squarely within the exception to the dual sovereignty doctrine announced in *Bartkus* v. *Illinois*, 359 U.S. 121

(1959). Moreover, the issue presented here is the precise issue left open in *United States* v. *Wheeler*, 435 U.S. 313 (1978), an issue this Court characterized as an "interesting question."

In its opposition, the United States engages in a simplistic analysis of the complex question raised by the decision below and concludes that because different sovereigns are involved, the later federal prosecution is permissible. But the United States fails to show that the court of appeals' opinion can be reconciled with either the reasoning of the Court under *Bartkus* or the related logic of *Wheeler*. Rather, the United States belittles the *Bartkus* exception and, although the issues involved in *Wheeler* were squarely ruled upon by the court below, attempts to hide behind a claim that petitioners have "waived" any argument based on *Wheeler* because it was not cited below. Further, the United States shrugs off the serious practical problems raised by the petition by asserting that Congress "authorized" duplicative penalties by "different sovereigns" for the same Clean Air Act violations. None of these arguments raised in the opposition demonstrates either that the decision below can be squared with Double Jeopardy decisions of this Court or that this Court should not review the court of appeals' decision.

1. The United States glosses over the significance of the issue raised in the petition by asserting that "petitioners are subject to separate federal and local enforcement actions because their conduct 'transgresses the laws of two sovereigns.'" Br. in Opp. 7 (quoting *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985)). But this Court's Double Jeopardy jurisprudence and, in particular, its cases analyzing the dual sovereignty doctrine are not as wooden as the United States suggests.

Contrary to the suggestion of the United States (Br. in Opp. 7-8), this Court's inquiry under the Double Jeopardy Clause does not end once it is determined that two sovereigns are involved. It is simply not an answer under

the Double Jeopardy Clause to say "separate federal and local enforcement actions charge separate offenses that are separately punishable." Br. in Opp. 7. Although Kentucky and the United States are indisputably separate sovereigns (see Pet. 17), this Court's decisions in *Bartkus*, *Wheeler*, *Grafton* v. *United States*, 206 U.S. 333 (1907), and *Waller* v. *Florida*, 397 U.S. 387 (1970), make clear that the mere fact that two sovereigns are involved does not automatically clear the way for multiple prosecutions for the same offense.

Here, because Kentucky has adopted federal Clean Air Act standards as its own and the federal government has delegated enforcement authority to Kentucky under that Act, this Court's decisions require a more searching examination of each sovereign's authority than that undertaken by the court below and defended by the United States in its opposition. The United States recognizes, as it must, that "[s]ection 112(d) provides that '[i]f the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.'" Br. in Opp. 3 (*quoting* 42 U.S.C. § 7412(d)(1)). But the United States proceeds to ignore this statutory language and baldly asserts that "Congress and the EPA did not 'delegate' authority to Kentucky to promulgate local regulations." Br. in Opp. 9.[1] Absent Section 112(d) and the delegation of authority by the federal government to Kentucky, there would be *no state authority* to act under the Clean Air Act, and no authority for Kentucky to impose more than $174,000 in fines on petitioners for violations of that Act.[2] The later prosecution by the

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[1] The United States' contention that Section 112(d) merely provides "an incentive" for Kentucky and other states ignores both the plain language of the statute and its practical effect.

[2] Plainly, the federal-state enforcement scheme under the Clean Air Act implicates issues that were not before this Court in the case on which the United States principally relies. See *Heath* v.

United States for these same violations raises a serious and unresolved question under the Double Jeopardy Clause.

As petitioners previously demonstrated, because the State of Kentucky acted as an agent for the federal government under authority delegated to it pursuant to the Clean Air Act, the decision below is inconsistent with the *Bartkus* exception. See Pet. at 11-12. The United States relegates its discussion of *Bartkus* to a single footnote, where, notwithstanding this delegation of enforcement authority, it asserts that the Jefferson County Board was not acting as a "tool" for the federal authorities. Br. in Opp. 9 n.2. But if the *Bartkus* exception is to have any meaning at all, it must except from the dual sovereignty doctrine the explicit delegation of enforcement authority, even if the delegation is from one sovereign to another. See Pet. 13.[3]

2. The United States does not dispute that the decision below will undermine efforts to enforce air quality

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Alabama, 474 U.S. 82, 87-88 (1985) (successive prosecutions by Georgia and Alabama for murder do not violate Double Jeopardy Clause). This is not a situation where states have initiated prosecutions under criminal laws enacted pursuant to their police powers. Here, in contrast, Kentucky was implementing a scheme of federal regulation under authority delegated to it by the federal government.

[3] To suggest, as does the United States, that petitioners read *Bartkus* too broadly, because "[t]he courts of appeals have uniformly rejected far narrower interpretations" (Br. in Opp. 9 n.2) is disingenuous, at best. The cases cited by the United States stand for the proposition that close cooperation between federal and state authorities does not implicate the *Bartkus* exception. See, *e.g.*, *United States* v. *Bernhardt*, 831 F.2d 181, 182-83 (9th Cir. 1987); *United States* v. *Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984); *United States* v. *Russotti*, 717 F.2d 27, 31 (2d Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *United States* v. *Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). Here, in contrast, "[t]he 'dual sovereignty' doctrine is inapplicable [because] separate prosecuting entities exercise authority of the same sovereign." *Aboumoussallem*, 726 F.2d at 910 n.2.

standards promulgated pursuant to the Clean Air Act. Instead, the opposition asserts that "Congress has authorized dual federal and state enforcement and has, in effect, rejected petitioners' policy arguments." Br. in Opp. 11. Plainly, the decision below raises serious policy and enforcement problems under the Clean Air Act, particularly by discouraging settlements of enforcement disputes. Pet. 13-15. By granting a writ of certiorari, this Court can resolve the uncertainty regarding what all parties here acknowledge are significant enforcement problems.

3. Rather than address squarely petitioners' assertion that the decision below is inconsistent with *Wheeler*, the United States, in apparent recognition that multiple enforcement actions under the Clean Air Act cannot be reconciled with that decision, initially argues that petitioners have waived this argument because they did not "cite *Wheeler* in their briefs to the court of appeals." Br. in Opp. 11. In *Wheeler*, this Court interpreted both the Double Jeopardy Clause and the dual sovereignty doctrine, issues that were raised below, squarely addressed by the court of appeals, and, indeed, discussed extensively in the United States' opposition. To suggest that these issues have been waived is nonsense.

The *Wheeler* court made clear that "[w]hat differentiated [cases holding that the dual sovereignty doctrine is inapplicable] from *Bartkus* and *Abbate* [v. *United States*, 359 U.S. 187 (1959)] was not the extent of control exercised by one prosecuting authority over the other but rather the ultimate source of the power under which the respective prosecutions were undertaken." 435 U.S. at 320. Plainly, the ultimate source of the power exercised by Kentucky is the federal government, and the federal government has delegated that authority to Kentucky.

The United States asserts that the statutory scheme results in only a "partial preemption[]" of Kentucky's sovereign authority. Br. in Opp. 12. But this again ig-

nores the express delegation of authority from the federal government to the states under Section 112 of the Clean Air Act, as well as Kentucky's adoption of the federal standards. States *qua* states have no authority to implement and enforce standards under the Clean Air Act. They only have such authority "if the Administrator finds the State procedure is adequate, [then] he shall delegate to such State any authority he has under this chapter to implement and enforce such standards." Without the delegation of authority from the EPA, Kentucky has *no* authority to enforce Clean Air Act standards. Only *after* the delegation may Kentucky enforce those standards. This is precisely the question left open in *Wheeler*: whether there is an exception to the dual sovereignty doctrine when Congress deprives a sovereign of its authority to act, and then that sovereign regains such authority from Congress. That "interesting" issue carries with it significant enforcement implications that require review by this Court.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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